In the Supreme Court of the United States

October Term, 1943

THE WEST LAUREL HILL CEMETERY COMPANY,
PETITIONER,

v.

W. J. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	9
Conclusion	15
Appendix	16

CITATIONS

Cases:	
Commissioner v. *Kensico Cemetery*, 96 F. 2d 594	9
Forest Lawn Memorial Park Assn. v. *Commissioner* 45 B. T. A. 1091	10
Trinidad v. *Sagrada Orden*, 263 U. S. 578	11
Statutes:	
National Industrial Recovery Act of 1933, c. 90, 48 Stat. 195, Sec. 215	11, 17
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 52	16
Sec. 103	12, 16
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 101	17
Sec. 701	17
Revenue Act of 1935, c. 827, 49 Stat. 1014:	
Sec. 105	17
Miscellaneous:	
Treasury Regulations 64, promulgated under Section 215 of the National Industrial Recovery Act, Art. 41	18
Treasury Regulations 77, promulgated under the Revenue Act of 1932:	
Art. 521	18
Art. 526	19
Treasury Regulations 64 (1934 ed.), Art. 71	21
Treasury Regulations 64 (1936 ed.), Art. 71	19

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OPINIONS BELOW

The original opinion of the District Court (R. 183a–192a) is reported in 44 F. Supp. 63. The opinion on rehearing (R. 194a–195a) is not officially reported. The opinion of the Circuit Court of Appeals (R. 206–215) is reported in 139 F. 2d 50.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered November 19, 1943 (R. 216–217). The petition for a writ of certiorari was filed

January 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in sustaining the judgment of the District Court holding that taxpayer was not exempt from taxation as a cemetery corporation under the provisions of Section 215 (c) (1) of the National Industrial Recovery Act, Section 103 (5) of the Revenue Act of 1932 and the corresponding provisions of the Revenue Act of 1934.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The taxpayer corporation was incorporated on November 9, 1869, under the laws of Pennsylvania (R. 27a, 46a–51a). On October 20, 1869, John J. Smith, representing the prospective incorporators, acquired in his own name a tract of land of 88.5 acres for the sum of $53,032.50, which it was agreed would be conveyed to the taxpayer (R. 27a). On November 16, 1869, Smith and his wife executed and acknowledged an absolute deed of this land to the taxpayer (R. 53a–57a). There was attached to the deed a writing signed by Smith and his wife acknowledging receipt of $53,032.50 as full consideration for the conveyance

(R. 57a). On November 23, 1869, at the first meeting of the corporators and stockholders, the deed was delivered to taxpayer, and on the same day recorded in the office for recording deeds in Montgomery County, Pennsylvania (R. 28a, 59a). The money paid to acquire the land had been advanced by the group who proposed to incorporate the taxpayer, for which they were to receive credit on their respective subscriptions to the taxpayer's capital stock when the land was conveyed to it (R. 38a). On the original "day book" opened by taxpayer, book entries were made showing the original purchase price of the land acquired, namely $53,032.50 (R. 38a). The "day book" also reflected entries thereafter made showing the amount subscribed to taxpayer's capital stock consisting of 3,000 shares, $50 par value per share, all of which was subscribed for and for which stock certificates were issued (R. 28a, 51a–53a). However, only $112,500 was actually paid in on account of the stock subscriptions (R. 28a, 40a–46a). During subsequent years, taxpayer purchased additional land from time to time amounting in the aggregate up to the year 1926 to 150.9 acres (R. 28a).

At a special meeting of taxpayer's board of managers on November 21, 1881, a report was submitted designated as a "Declaration of the Trusts under which the Cemetery Company holds its lands" (R. 28a–29a, 60a–63a). The trust declaration among other things provided that the

persons named as corporators in taxpayer's charter should be deemed stockholders and entitled to one vote each and that the holders of the certificates under the trust declaration should "have all the rights and privileges of Stockholders in the said Company with a vote for each share represented by the aforesaid Certificates respectively, and eligible as Managers of said Company" (R. 62a–63a). A resolution was thereupon adopted by the board which provided that the contributions subscribed for the purposes set out in the report were thereafter to be considered and treated as fully paid up, and that upon surrender of the original certificates for cancellation, new certificates were to be issued in the form thereby prescribed[1] (R. 29a, 63a). At the annual meet-

[1] The form of the certificates as prescribed by the resolution of November 21, 1881, is as follows (R. 63a):

"Whole Number of Shares 3,000

"THE WEST LAUREL HILL CEMETERY COMPANY

"THIS CERTIFIES that ------ ------ is entitled to ------ parts or shares in THE WEST LAUREL HILL CEMETERY, under the trusts declared by THE WEST LAUREL HILL CEMETERY COMPANY, Transferable only on the books of said Company, in person or by attorney on surrender of this Certificate.

"IN TESTIMONY WHEREOF, The West Laurel Hill Cemetery Company have caused this certificate to be signed by their President and countersigned by their Treasurer this ------ day of ---------- A. D. 18----.

"----------

"*President.*

"----------

"*Treasurer.*"

ing of taxpayer's stockholders held the same day (November 21, 1881) a resolution was unanimously adopted approving the declaration of trust and the resolution declaring the contribution fund fully paid, as passed at the meeting of the board (R. 63a–65a). Taxpayer's paid-in capital of $112,500 has since 1881 remained unchanged (R. 29a).

From 1875 to 1881 inclusive, except for the year 1878, taxpayer distributed to its stockholders, and from 1881 up to the present time, to the owners of its certificates issued pursuant to the resolution of November 21, 1881, dividends or distributions out of earnings or profits in proportion to their respective holdings of shares of stock or certificates issued to them (R. 29a). From 1875 to and including 1881 the distributions to shareholders aggregated $27,000, or a yearly average of $3,857.14. From 1882 to the close of the year 1912, the aggregate sum so distributed was $753,000 or a yearly average of $24,290.32. From 1913 to the close of the year 1931, the aggregate sum so distributed was $1,263,000, or a yearly average of $66,473.68 (R. 29a, 65a–68a). The payments so made by taxpayer out of earnings or profits were sometimes designated on its books as "dividends" and at other times as "distributions" (R. 34a–35a). Notwithstanding the distributions of net income as above stated, aggregating $2,043,000 (R. 68a) taxpayer's undistributed earn-

ings continued to increase so that at the close of the year 1931, it had accumulated an earned surplus of more than $1,400,000 (R. 74a–148a).[2]

From the date of organization and up to the present time, taxpayer has owned and operated a nonsectarian cemetery. Its chief source of income during this period has been the sale and resale of burial rights in lots in the cemetery, but it has also received income from interments and rentals, greenhouse operations, sale of vaults, special care of grounds, rentals from real estate, and the income from the principal of the permanent and contingent funds set aside pursuant to the so-called resolution of November 21, 1881. (R. 32a.)

Taxpayer's expenditures have been chiefly for salaries, wages, rent, interest, repairs, advertising, taxes, material and equipment, and for other incidental expenses, and it has set aside and paid amounts into the permanent and contingent funds as provided in the declaration of trust (R. 33a). After payments of dividends or distributions to stockholders, the balance remaining was retained by taxpayer, and invested in securities or other assets (R. 33a).

Since its organization, taxpayer's operations have been under the control of its board of man-

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[2] The balance sheet attached to taxpayer's 1931 corporation income tax return for the calendar year 1931 (Stip. Ex. 40, not printed in the record) reflects an undistributed surplus in excess of $1,400,000.

agers and its officers who received compensation for their services, are elected by its shareholders, and who are permitted to vote for and are eligible to become officers and managers (R. 34a). The owners of burial rights have no voice in taxpayer's affairs, or in the operation of the cemetery, and are not entitled to participate as burial right owners in any dividends or distributions of taxpayer's net earnings or profits (R. 34a). No corporate bylaws were in existence until August 24, 1934 (R. 34a, 154a–165a).

From the date of organization to September 1933, taxpayer sold burial rights in the lots in the cemetery owned by it, and upon receipt of the full sales price a burial right deed was executed and conveyed to the purchaser (R. 35a). Upon receipt of payment in full from the purchaser thereof, taxpayer set apart in what was designated a permanent fund approximately 10 percent of the amount received from the proceeds of sales of burial rights. The principal of the amount so set apart as a permanent fund was placed in the hands of fiduciaries as a trust fund, and the annual income thereof was used and applied by taxpayer to the preservation of the cemetery premises. The cemetery has always been managed and operated by taxpayer in the same manner. (R. 35a–36a.)

Since 1914 and up to and including the year 1935, taxpayer has filed its federal corporation

income and/or excess profits tax returns as well as capital stock tax returns for the years during which the capital stock tax law was in effect (R. 36a). It also filed for each of these years a petition claiming that it was exempt from tax as a corporation, which petitions after being considered by the Commission of Internal Revenue were rejected (R. 36a, 170a, 174a–175a). Taxpayer paid the taxes disclosed on these returns (R. 36a).

The amount sought to be recovered in each of these actions represents capital stock taxes disclosed to be due in capital stock returns filed for each of the fiscal years ended June 30, 1933, June 30, 1934, and June 30, 1935 (R. 152a–153a).[3] Assessments of the capital stock taxes disclosed on the returns filed by taxpayer aggregated $3,325.53, including interest, payments of which were made on October 31, 1935, November 1, 1935, and July 31, 1935, respectively (R. 4a, 8a, 12a). Thereafter claims for refund of the amounts so paid were timely filed with the Collector on the ground that taxpayer was exempt from capital stock tax within the meaning of the statute (R.

[3] The capital stock tax returns for the fiscal years 1933, 1934 and 1935 were attached to the stipulation as part of Exhibits 42, 43 and 44, respectively, but by agreement were not printed in the record.

4a, 8a, 12a). On May 25, 1937, the Commissioner notified taxpayer that its claims for exemption and refund had been rejected (R. 4a, 8a, 12a). The present actions were timely instituted in the District Court (R. 2a, 6a, 11a) and after issue was joined (R. 15a, 17a, 20a) these actions were consolidated for trial. Motions for summary judgment were filed by each respective party supported by a stipulation of agreed facts (R. 23a–26a) and upon consideration thereof the District Court granted the Collector's motions, holding that taxpayer was not exempt from taxation as a cemetery corporation within the meaning of the statute (R. 194a). On July 9, 1942, a judgment order was accordingly entered in favor of the Collector (R. 195a).

Upon appeal, the court below affirmed the judgment of the District Court in each case on November 19, 1943 (R. 206–218).

ARGUMENT

(1) The decision of the court below is not in conflict or inconsistent with *Commissioner* v. *Kensico Cemetery*, 96 F. 2d 594 (C. C. A. 2d), chiefly relied upon by taxpayer. In that case, a cemetery company was organized under the membership laws of the State of New York as a rural cemetery association and had no paid-in capital. After incorporation it acquired lands for burial

purposes and issued land share certificates to the vendors under an agreement to pay as the purchase price, instead of a fixed sum, one-half of the proceeds from the sale of burial lots plotted from the land. These payments were not in any manner contingent upon the operations or net earnings of the company. The Circuit Court of Appeals held that the certificates issued by the cemetery company to the grantors in payment for the land were in reality certificates of indebtedness entitling the holders thereof to share in one-half of the proceeds from the sale of burial lots in payment for the land sold to the cemetery, and that since no part of its net earnings inured to the benefit of any private shareholder or individual, the cemetery was exempt from taxation. The court below held that this was not the situation presented here.

The facts in *Forest Lawn Memorial Park Assn.* v. *Commissioner,* 45 B. T. A. 1091, cited by taxpayer, are also distinguishable from those present here. In that case the Board of Tax Appeals held petitioner, a nonprofit organization, to be exempt from taxation as a cemetery company because it served the predominant purposes of its incorporation, used its net income for the advancement of its corporate purposes, and did not distribute any of its net earnings to any private individual or shareholder.

(2) The facts here are obviously different from those in *Trinidad* v. *Sagrada Orden*, 263 U. S. 578, also relied upon by taxpayer. The organization there was a corporation sole and its income was devoted exclusively to religious and charitable purposes. There were no individuals who had a personal interest in or who pecuniarily benefited from the operations of the company. Consequently, none of its net earnings inured to the benefit of any private shareholder or individual, a situation far different from that present here. While the fact that a cemetery company operates at a profit does not deprive it of its right to exemption, nevertheless, as the court below correctly said (R. 213),

> * * * if it has earnings and desires to maintain an exemption status, it must use all such income exclusively for the promotion and maintenance of the cemetery purposes for which it was created. Manifestly the instant taxpayer has not done that.

(3) Section 215 (a) of the National Industrial Recovery Act (Appendix, *infra*, p. 17) imposes a capital stock tax on domestic corporations for each year ending June 30th, and provides in subsection (c) (1) thereof that the taxes imposed by that section shall not be applied "to any corporation enumerated in section 103 of the Revenue Act of 1932."

Section 103 (5) of the Revenue Act of 1932[4] (Appendix, *infra*, p. 16) grants exemption from tax liability

> (1) to cemetery companies owned and operated exclusively for the benefit of their members, or
>
> (2) not operated for profit; and
>
> (3) to any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

The taxpayer has obviously failed to show that it meets any of the statutory requirements which would entitle it to exemption from the capital stock taxes for the taxable years involved.

Taxpayer is not "owned and operated exclusively for the benefit of [its] members." The undisputed facts clearly disclose that the taxpayer has at all times since its organization in 1869 operated in a manner similar to that of any ordinary business corporation employing regular business methods with much success over a long period of years for the benefit of its shareholders.

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[4] The applicable provisions of the Revenue Acts of 1934 and 1935 are substantially similar. The applicable Treasury Regulations promulgated thereunder (Appendix, *infra*), which have remained substantially the same, set forth the requirements which must be met to establish the fact that a corporation is entitled to exemption as a cemetery company.

Consequently, taxpayer has never been owned and operated exclusively for the benefit of the owners of burial rights or lots in the cemetery, who are not necessarily shareholders, and who neither had nor have any voice in the management or operation of the company's affairs. As the court below pointed out, the owners of lots or burial rights (R. 212–213)—

> * * * are nothing more than patrons of the sepultural facilities which the cemetery furnishes. The owners of the company's certificates, to whose large material benefit the cemetery has been operated over the years, are not the members contemplated by the exemption provisions, found in the Revenue Acts, with respect to cemetery companies.

Taxpayer is "operated for profit" for the sole benefit of its shareholders or owners of certificates. Starting with a comparatively small capital in 1869, out of which it purchased its original land and with additional lands similarly acquired, taxpayer has distributed out of its net earnings or profits from 1875 to 1931 to the holders of 3,000 shares or certificates of $50 par value each (subscribed but not fully paid for), a total of $2,043,000, or an average annual distribution of about $36,482 over this 56-year period. At the same time it had accumulated an undistributed surplus of more than $1,400,000 at the end of 1931.

Taxpayer urges, however, that since 1881 the distributions made to the holders of certificates represented the consideration for the conveyance of the land conveyed to the company. This contention is based on the provisions of the so-called declaration of trust of 1881 which provided that the distributions to certificate holders should be "the consideration for the conveyance of the said premises to the said Company" (R. 62a). It is obvious, however, that this provision is contrary to the undisputed facts. The record clearly shows that the land originally purchased was conveyed to the taxpayer by absolute deed in consideration of a payment in cash. The books of the company clearly disclose this fact. The distributions which were subsequently made bear no relation whatever to the discharge of a liability for the cost of the land, nor were they based on any fixed percentage of the sales prices of the lots or burial rights. On the contrary, the distributions to the certificate holders were made from the commingled surplus earnings of the company after payment of all operational expenses, and after setting aside to a permanent fund approximately ten per cent of the sales price of the lots or burial rights and a discretionary amount not in excess of ten per cent to what was termed a contingent fund. While taxpayer was originally chartered as a cemetery corporation, nevertheless payments were made from year to year out

of net annual income as dividends or distributions, so that it cannot be said that "no part of" its net income "inures to the benefit of any private shareholder or individual" so as to come under the third exemption clause of the statute.

(4) The question presented here does not involve any important question of federal law, since the decision in each case involving a statutory exemption from tax as a cemetery company must necessarily depend upon its particular facts.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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